

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WVTV Licensee, Inc.)	Facility ID No. 74174
)	NAL/Acct. No. 0741420029
Licensee of Station WVTV(TV))	FRN: 0002209260
Milwaukee, Wisconsin)	

FORFEITURE ORDER

Adopted: April 20, 2010

Released: April 21, 2010

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“Order”), we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000), to WVTV Licensee, Inc. (“WVTV Licensee”), licensee of Station WVTV(TV), Milwaukee, Wisconsin (“Station”), for its willful and repeated violation of Section 73.670 of the Commission’s Rules (“Rules”) by failing to comply with the limits on commercial matter in children’s programming.¹

II. BACKGROUND

2. On August 1, 2005, WVTV Licensee filed an application to renew the license of the Station, File No. BRCT-20050801BDQ (“Application”). Section IV, Question 5 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that it has complied with the limits on commercial matter in children’s programming specified in Section 73.670 of the Commission’s Rules. WVTV Licensee indicated “No” to that certification, indicating in an Exhibit and in an amendment to the Application that the Station exceeded the children’s television commercial limits by 90 seconds.

3. WVTV Licensee also reported that on September 24, 2002 during the “Pokemon” program, the Station broadcast a commercial for the Gameboy Advance E-Reader. The Licensee indicated that during the commercial, three “Pokemon” game cards were shown for approximately 1.04 seconds. According to WVTV Licensee’s description, the “Pokemon” game cards were partially hidden and only the letters “MON” were identifiable. Moreover, WVTV Licensee stated that the “Pokemon” characters were not identifiable and were not verbally identified during the commercial. Licensee maintained that the *de minimis* appearance of these cards could not have confused the viewer and that this occurrence does not violate the children’s programming commercial limits rules.

4. WVTV Licensee also stated that on July 19, 2004 during the “Sabrina” program, the Station aired a commercial for Cinnamon Toast Crunch. WVTV Licensee claimed that the image of several DVDs that were being given away in boxes of Cinnamon Toast Crunch appeared at the end of the commercial. WVTV Licensee explained that the image of one of these DVDs included the “Sabrina” character and that it was visible for less than two seconds.

5. Further, WVTV Licensee indicated that on December 23, 2006, the Station aired a CW

¹ 47 C.F.R. § 73.670.

Network commercial for Post Cereal's Cocoa Pebbles during the "Xiaolin Showdown" program. WVTV Licensee maintained that images from Post Cereal's postopia.com website appeared, including images of the website's navigation bar. According to WVTV Licensee, the navigation bar included a "very brief" appearance of characters from the "Xiaolin Showdown" program. WVTV Licensee argued that these characters were visible for a short period of time, "comprised only a tenth of the screen height, and did not speak during the commercial spot."

6. On May 7, 2007, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of twelve thousand dollars (\$12,000) to WVTV Licensee for its violations.² In the NAL, the Bureau found that the Station's record of exceeding the Commission's children's television commercial limits on four occasions, including three program-length commercials, during its license term constituted an apparent willful and repeated violation of Section 73.670 of the Commission's Rules. On June 6, 2007, in response to the NAL, The CW Network, LLC ("CW"), The WB Television Network ("WB"), and Sinclair Broadcast Group, Inc. ("Sinclair"), on behalf of the Station submitted a Letter requesting that the Bureau reconsider its findings and conclude that the September 24, 2002 Pokemon Program and the December 23, 2006 "Xiaolin Showdown" Program were not program-length commercials, and modify the forfeiture accordingly ("Letter"). Further, CW, WB and Sinclair request that if the Bureau finds that the Pokemon Program and the Xiaolin Showdown Program were not program-length commercials, that the Bureau also find that these incidents do not constitute Host-Selling.

III. DISCUSSION

7. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,³ Section 1.80 of the Rules,⁴ and the Commission's *Forfeiture Policy Statement*.⁵ In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁶

8. In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial").⁷ In addition, the Commission reiterated its long-standing policy against "host-selling," *i.e.*, "the use of program talent to deliver commercials," including "endorsements

² *WVTV Licensee, Inc.*, 22 FCC Rcd 8499 (MB 2007) ("NAL").

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

or selling by animated cartoon characters as well as ‘live’ program hosts.”⁸

9. CW, WB, and Sinclair argued that the December 23, 2006 “Xiaolin Showdown” program did not constitute a program-length commercial because the commercial for Post Cereal’s Cocoa Pebbles did not promote a program-related product. CW, WB, and Sinclair also asserted that if the Bureau concludes that the “Xiaolin Showdown” program was not a program-length commercial, that the Bureau should also find that no host-selling occurred.

10. CW, WB, and Sinclair explained that the latter part of the Cocoa Pebbles cereal commercial invited viewers to visit the Postopia website to enter for a free snowboard and that the homepage depicted a navigation bar on the top of the webpage that included one or more “Xiaolin Showdown” characters. Based on the description of the December 23, 2006 “Xiaolin Showdown” commercial, it appears that this incident is more akin to a violation of the Commission’s host-selling policy, rather than a program-length commercial.

11. According to CW, WB, and Sinclair there is no host-selling violation since the images of the Xiaolin Showdown characters do not appear in the segment of the commercial that promotes a product, namely, the Cocoa Pebbles cereal. Since there is no connection between the “fleeting images” of the Xiaolin Showdown characters and the subject of the cereal commercial, the characters were not used to promote a product, argued CW, WB, and Sinclair. The subject commercial submit CW, WB, and Sinclair does not constitute host-selling.

12. Host-selling involves program-related characters promoting any product during the character(s)’ program,⁹ and is a practice that the Commission has denounced because it takes unfair advantage of the trust that children place in program characters.¹⁰ In this regard, the Commission has stated that “host-selling encompasses any character endorsement – not just direct vocal appeals – that has the effect of confusing a child viewer from distinguishing between program and non-program material.”¹¹ For example, the Commission has determined that “advertisements featuring the same type of animation that is regularly featured in the accompanying program constitutes host-selling.”¹² Based on the information before us, we believe the commercial broadcast on December 23, 2006, violated the Commission’s host-selling policy.

13. CW, WB, and Sinclair argued that the September 24 2002 incident did not constitute a program-length commercial because no “Pokemon” characters appeared in the commercial and the commercial for the Gameboy Advance E-Reader did not promote a product related to the “Pokemon” program.¹³ Specifically, CW, WB, and Sinclair asserted that the only product promoted in the Gameboy commercial was the Gameboy Advance E-Reader. As part of the portrayal of the Gameboy Advance E-Reader, the Gameboy commercial “briefly showed a special game card with the letters ‘mon.’ The word “Pokemon”, however, was not shown or stated aloud” during the commercial. The “fleeting appearance of these letters would not sufficiently identify the “Pokemon” program to the child audience, argued CW,

⁸ *Id.* at 2127 n. 147, 6 FCC Rcd at 5097; *see also Action for Children’s Television*, 50 FCC 2d 1, 8, 16-17 (1974).

⁹ *See, e.g., Ponce-Nicasio Broadcasting (KCMY(TV))*, 10 FCC Rcd 6728 (1995).

¹⁰ *Children’s Television Recon*, 6 FCC Rcd at 5097; *Action for Children’s Television*, 50 FCC 2d at 16-17.

¹¹ *WHYY, Inc. (WHYY-TV)*, 7 FCC Rcd 7123 (1992).

¹² *Id.*

¹³ In their Letter, CW, WB, and the Station stated that the Gameboy Advance E-Reader is a device that lets users swipe a special card in order to “upload” a game or other information to the Gameboy Advance, a handheld video game console. According to CW, WB, and the Station, “[o]ne set of available special cards is for a game based on Pokemon creatures.”

WB, and Sinclair. Since the commercial promoted a product not related to the “Pokemon” program, CW, WB, and Sinclair submit that the “Pokemon” program did not constitute a program-length commercial.

14. We disagree that the Station’s broadcast of the commercial for the Gameboy Advance E-Reader does not constitute a program-length commercial. The Commission has consistently held that where a commercial announcement is primarily for a product otherwise unrelated to a program, but that announcement also includes references to or offers of products which are related to the program, then the broadcast of that commercial announcement during the program to which the included products relate will render that program a program-length commercial.¹⁴ CW, WB, and Sinclair indicated that one set of available cards to be used with the Gameboy Advance E-Reader, is for a game based on Pokemon creatures. According to CW, WB, and Sinclair, portions of three of these special Pokemon cards were shown during the commercial. We believe that the “Pokemon” game cards shown in the Gameboy commercial relate to the “Pokemon” television program that has the same title. Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the Gameboy commercial and the “Pokemon” program regardless of whether any “Pokemon” character is depicted given the image of a “Pokemon” game card contained in the commercial and the consequent likelihood that children may associate it with the program, which bears the same title.

15. CW, WB, and Sinclair asserted that the appearance of some of the letters from the word “Pokemon” was “fleeting” and would not sufficiently identify the “Pokemon” program to the child audience. However, it is well-established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.¹⁵

16. CW, WB, and Sinclair also argued that if the Bureau finds that the “Pokemon” program was not a program-length commercial, that the Bureau should also find that no host-selling occurred. We have considered the Letter submitted by CW, WB, and Sinclair and conclude that the Station’s broadcast of the commercial for the Gameboy Advance E-Reader constitutes a program-length commercial. In light of this decision, we dismiss as moot the request to find that no host-selling occurred.

17. We have considered the Letter submitted by CW, WB, and Sinclair and the record of this case in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that WVTV Licensee, Inc. willfully¹⁶ and repeatedly¹⁷ violated Section 73.670 of the Rules. However,

¹⁴ See, e.g., *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (1995); *Scripps Howard Broadcasting Co. (KNXV-TV)*, 9 FCC Rcd 2547 (1994); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (1994); *Quad Cities Television (KLJB-TV)*, 9 FCC Rcd 1711 (1994).

¹⁵ *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); see also *WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

¹⁶ Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”).

having found the December 23, 2006 “Xiaolin Showdown” incident to be a host-selling violation, but not a program-length commercial, we reduce the \$12,000 forfeiture proposed against WVTM Licensee, Inc. to \$8,000.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission’s Rules,¹⁸ that WVTM Licensee, Inc., SHALL FORFEIT to the United States the sum of eight thousand dollars (\$8,000) for willfully and repeatedly violating Sections 73.670 of the Commission’s Rules.

19. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission’s Rules within 30 days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁹ Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Act. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code).

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¹⁷ Section 312(f)(1) of the Act defines “repeated” as “the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(1). *See also Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

¹⁸ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

¹⁹ 47 U.S.C. § 504(a).

20. WVTV Licensee, Inc.'s request for full payment of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰

21. IT IS FURTHER ORDERED that copies of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail, to WVTV Licensee, Inc., c/o Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128, and to its counsel, Kathryn R. Schmeltzer, Esquire, Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: The CW Network, LLC
The WB Television Network
Sinclair Broadcast Groups, Inc.
Kathleen Q. Abernathy, Esq.

²⁰ See 47 C.F.R. § 1.1914.